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In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK L. CARSON, ET AL., PETITIONERS

v.

AMERICAN BRANDS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation of April 14, 1980.

QUESTIONS PRESENTED

1. Whether the district court's order refusing to approve a consent decree providing for injunctive relief in a Title VII case was appealable under 28 U.S.C. 1292(a)(1) as an order refusing an injunction.

2. Whether the district court's order refusing to approve a consent decree was an appealable final decision under 28 U.S.C. 1291.[1]

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[1]The remaining questions presented by the petition (Pet. 6-7), while raised below, were not passed upon by the court of appeals since the court determined that it lacked jurisdiction over the appeal. Under

STATEMENT

1. Petitioners, representing a class of black present and former seasonal employees and applicants for employment at the Richmond Leaf Department of the American Tobacco Company, a subsidiary of respondent American Brands, Inc., brought this suit on October 24, 1975 under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, 42 U.S.C. 2000e *et seq.* and under 42 U.S.C. 1981, alleging that the company and respondent union had discriminated against black workers in hiring, promotion, and transfer opportunities.

After conducting extensive discovery, the parties reached an agreement settling petitioners' claims, and jointly moved the district court for approval of the settlement pursuant to Fed. R. Civ. P. 23(e) and entry of a proposed consent decree. The district court, in a memorandum opinion and order filed June 2, 1977, refused to enter the proposed decree on the ground that it illegally granted racial preferences to black employees (Pet. App. 28a-51a).

On September 14, 1979, the court of appeals, sitting *en banc*, dismissed petitioners' appeal for lack of jurisdiction, with Chief Judge Haynsworth and Circuit Judges Winter and Butzner dissenting (Pet. App. 1a-27a).

2. The facts accepted as true by the district court for the purpose of considering the consent decree demonstrated that American Brands, Inc. has two categories of employees—regular employees who work year-round and seasonal employees who work an average of six months a year (Pet. App. 29a-30a). Prior to September 1963, certain of the regular job classifications

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such circumstances, this Court ordinarily declines to consider issues. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479 (1976).

were reserved for whites and all seasonal employees were black (Pet. App. 30a). Although blacks were hired after September 1963 into regular job classifications and, as of February 1976, constituted 66% of the regular employees, seasonal employees continue to be all black (*ibid.*).

Separate seniority rosters are maintained for regular and seasonal employees. Seasonal employees may transfer to regular positions only when no regular employee is interested in the particular position, and in so doing they lose all accumulated seniority (Pet. App. 30a). Since seniority governs promotions, demotions, layoffs, recalls and vacations, the loss incurred by transfer to a regular position is significant (Pet. App. 31a).

Although blacks constitute 66% of the company's regular employees and 84% of its production unit, only 20% of the supervisory positions are held by blacks (Pet. App. 31a).

The consent decree negotiated by the parties proposed modifications of the seniority and transfer policies which would allow seasonal workers to maintain their seniority upon transfer to regular positions and would require that, prior to hiring from the outside, seasonal employees be given the opportunity to fill vacancies not filled by regular employees for all hourly paid permanent production jobs and for the job of watchman, formerly reserved for whites (Pet. App. 32a-33a).[2] The decree also eliminated the requirement that seasonal employees serve an additional probationary period after transfer to regular positions (Pet. App. 33a). In addition, the decree set a

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[2]Of 16 watchmen employed by the company in February 1976, only one was black (Pet. App. 30a).

goal for the filling of production supervisory positions with qualified blacks so that 1/3 of such positions would be held by blacks by December 31, 1980 (Pet. App. 33a).

Finally, the proposed decree contained an injunction prohibiting respondents from discriminating against black workers and a three-year reporting requirement so that compliance with its provisions could be monitored (Pet. 14).

3. The district court concluded that because respondents expressly denied having discriminated against the class of petitioners, the foregoing provisions of the decree (which benefitted only seasonal employees all of whom are black) constitute preferential treatment prohibited by Title VII and the Constitution (Pet. App. 32a, 45a-48a). The court also concluded that even if there was evidence of present discrimination or the present effects of past discrimination, the relief envisioned by the decree would be inappropriate because it was not limited to actual victims of that discrimination (Pet. App. 39a-42a, 46a).

4. The court of appeals dismissed the appeal, holding that the district court's order refusing to approve and enter the consent decree was neither a final decision appealable under 28 U.S.C. 1291 nor an order refusing an injunction under 28 U.S.C. 1292(a)(1) since "[t]he immediate consequence of the order is continuation of the litigation and * * * the merits of the decree can be reviewed following final judgment" (Pet. App. 2a). The court analogized the order to the denial of a motion for summary judgment which, if granted, would include injunctive relief, and to the denial of class certification where the complaint seeks broad injunctive relief. Noting that in both of those circumstances this Court has held

that no appeal would lie (*Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966); *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978)), the court of appeals concluded that the result should be the same here (Pet. App. 5a-6a).

Three of the seven judges dissented, concluding in an opinion by Judge Winter that the order declining to approve the consent decree was appealable under 28 U.S.C. 1292(a)(1) (Pet. App. 18a). The dissenting judges distinguished the district court's order from the refusal to certify a class in *Gardner*, *supra*, reasoning that a refusal to enter a consent decree cannot be effectively reviewed following final judgment (Pet. App. 20a-21a). Similarly, the dissenters distinguished the challenged order from the denial of summary judgment in *Switzerland Cheese*, *supra*, reasoning that here the district court conclusively determined important issues adversely to petitioners' claims (Pet. App. 21a).[3]

DISCUSSION

The decision below is in conflict with the Fifth Circuit's decision in *United States* v. *City of Alexandria*, 614 F. 2d 1358 (1980), regarding whether a district court order refusing to enter a consent decree containing injunctive provisions is an order refusing an injunction within the meaning of 28 U.S.C. 1292(a)(1).[4] It is also in conflict

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[3]Turning to the merits of the appeal, the dissenting judges concluded that the district court abused its discretion in refusing to approve the decree (Pet. App. 22a-26a). They would have modified the decree, however, to give notice and an opportunity to object to a sub-class for whom no relief was provided in the settlement.

[4]The court in *City of Alexandria* sought to distinguish the instant case as "relating to" a class action. 614 F. 2d at 1361 n.5. However, "[t]he appealability of any order entered in a class action is

with the Ninth Circuit's decision in *Norman* v. *McKee*, 431 F. 2d 769 (1970), regarding whether an order refusing to enter a consent decree is a "final decision" within the meaning of 28 U.S.C. 1291. Accordingly, review by this Court is warranted.

Furthermore, the decision below frustrates an important congressional policy embodied in Title VII of the Civil Rights Act of 1964. As this Court recognized in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (citations omitted):

> Congress enacted Title VII * * * to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. * * * Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.

If appellate review of a district court's refusal to enter a consent decree is not available until after the case has been tried and a final judgment entered, the benefits envisioned by Congress from voluntary resolution of employment discrimination claims will be irrevocably lost to the parties. For this reason as well, further review is warranted.

1. As a general rule, appellate review of district court orders is limited by statute to final decisions. 28 U.S.C. 1291; *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978); *Gardner* v. *Westinghouse Broadcasting Co.*, *supra*. However, exceptions to the rule have been recognized

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determined by the same standards that govern appealability in other types of litigation." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 470 (1978).

both by judicial decision (see, *e.g.*, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949)), and by statute (28 U.S.C. 1292) where interlocutory review would serve the interests of justice.

Section 1292(a) provides that "[t]he courts of appeals shall have jurisdiction of appeals from: (1) [i]nterlocutory orders * * * granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." An order refusing to approve a consent decree providing for injunctive relief would appear to come within that Section's plain language. However, this Court has stressed that Section 1292(a)(1) "does not embrace orders that have no direct or irreparable impact on the merits of the controversy." *Gardner* v. *Westinghouse Broadcasting Co.*, *supra*, 437 U.S. at 482. Thus, the touchstone for determining whether an order falls within the Section is whether it is "of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181 (1955).

In *Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc.*, *supra*, this Court held that an order denying a motion for summary judgment was not "interlocutory" within the meaning of Section 1292(a)(1) because it related only to pretrial procedures and did not touch on the merits of the claim. The Court noted (385 U.S. at 25) that the order was "strictly a pretrial order that decides only one thing—that the case should go to trial." And in *Gardner* v. *Westinghouse Broadcasting Co.*, *supra*, this Court held (437 U.S. at 480-481) that a denial of class certification was not appealable under Section 1292(a)(1) because "[i]t could be reviewed both prior to and after final judgment; it did not affect the merits of [the plaintiff's] own claim; and it did not pass on the legal sufficiency of any claims

for injunctive relief." In contrast, the district court's order here did much more than merely advance the case to trial. It determined that the relief agreed upon by the parties could not legally be approved by the court. Since nothing short of an admission of discrimination by the respondents or a full trial on the merits (resulting in findings of fact different from those to which the parties stipulated for purposes of settlement) could have persuaded the district court to grant the relief provided in the consent decree, the parties were denied the opportunity to settle their dispute voluntarily.

That opportunity, of course, cannot be recaptured once the case goes to trial.[5] Nor can the propriety of the court's refusal to enter the decree be reviewed after final judgment. A settlement agreement reflects the parties' assessment at a given point of the strengths and weaknesses of their respective cases, and their assessment of the advantages and disadvantages of, and risks and uncertainties inherent in, going to trial. That state of facts, of mind, and of perspective cannot faithfully be reconstructed once intervening events have altered the

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[5]Notwithstanding the court of appeals' observation (Pet. App. 8a) that "[w]hen a district court objects to the terms of a decree, alternative provisions can be presented, and perhaps a disapproved decree may be entered with further development of the record," as a practical matter a refusal to enter a consent decree should be viewed as a conclusive determination. Where alternative provisions prove satisfactory to the parties, no appeal would be taken even if available. On the other hand, where agreement cannot be reached, the theoretical existence of alternatives should not foreclose appeal if the court refuses to enter a decree for which agreement in fact has been reached. Moreover, in the instant case there is no realistic possibility of agreement on an alternative settlement since the district court's decision hinged not on any unfairness to either side in the agreed upon settlement, but rather on the legal question whether the relief sought in the proposed decree violates Title VII and the Constitution in the absence of proven or admitted discrimination.

parties' (and the court's) view of the case. Moreover, to the extent the facts adduced at trial vary materially from the facts as they appeared at the time the consent decree was rejected by the court, entry of a judgment based on the terms of the decree is at least arguably improper.

Therefore, the district court's order—given its unreviewability at a later date, its roots in the premise that the relief sought by the parties lacks a legal basis and is itself unlawful, the fact that it deprives the parties of the chance to settle their differences voluntarily, and the fact that it prolongs rather than expedites resolution of this case—comes within the purposes as well as the literal terms of Section 1292(a)(1).

2. For the same reasons, the district court's order is appealable under 28 U.S.C. 1291 as a "collateral order." As this Court has said (*Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 468), "[t]o come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen* [v. *Beneficial Industrial Loan Corp.*], the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Viewed one way, the district court's order in this case touched significantly on the merits in that the refusal to enter the consent decree was based on the court's opinion regarding what relief is proper under Title VII and what constitutes "preferential treatment" under that statute. Viewed another way, the order is wholly separate (or separable) from the merits. Whether the consent decree should have been entered is a question separate and apart from whether the plaintiffs would prevail on the merits at trial were the facts underlying the settlement agreement proved. Moreover, a

judgment on the merits would rest on facts actually proved at trial rather than on the findings anticipated by the parties for purposes of settlement. As the Ninth Circuit observed in *Norman* v. *McKee*, *supra*, 431 F. 2d at 773: "The proposed settlement is independent of the merits of the case. It would not merge in final judgment. Disapproval of the settlement is not a step toward final disposition and it is not in any sense an ingredient of the cause of action. In itself, the district judge's order is final on the question of whether the proposed settlement should be given judicial approval."[6]

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[6]Respondents argue (Br. in Opp. 6-10) that the questions presented in the petition have been rendered moot by respondents' withdrawal of consent to the entry of the decree. We disagree. In submitting the proposed decree to the court, the parties impliedly agreed to abide by its terms if they are judicially approved. Had one of the parties wished to repudiate the agreement before the district court had an opportunity to act, it would not have been free to do so under the terms of the agreement, though it would have remained free to argue to the court that because of unforeseeable changed circumstances the decree should not be entered (just as a party on like grounds can seek modification of a decree). The same rule should apply on appeal. Otherwise, a party's right to take an appeal is conditioned on the acquiescence of its adversary. Nothing in the proposed decree agreed to by the parties to this case requires that result.

Parties should, of course, remain free to limit and condition their assent to a settlement agreement as they see fit. Here the parties did not enter into a separate agreement, but instead submitted a joint proposed consent decree. Nevertheless, underlying every settlement agreement, written or implied, is the implicit expectation that in deciding whether to approve the settlement the district court will act nonarbitrarily and in conformity with the law.